NOT FOR ROUTINE PUBLICATION

United States Court of Appeals
Tenth Circuit

A. S. HORNER, INC.,
Petitioner

v. No. 79-2185

NATIONAL LABOR RELATIONS BOARD,
Respondent and
Cross-Petitioner

On Petition for Review and Cross-Application
For Enforcement of an Order of The
National Labor Relations Board
(Case No. 28-RC-3517

Nicholas J. Noeding (Barbara L. Shapiro with him on the brief) of Poole, Tinnin & Martin, Albuquerque, New Mexico for Petitioner-Appellant.

Bernard P. Jeweler (John H. Ferguson and Sara M. Green, Attorneys, William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, on the brief), National Labor Relations Board, Washington, D.C., for Respondent-Appellee

Before McWILLIAMS and BARRETT, Circuit Judges, and ANDERSON, District Judge.*

BARRETT, Circuit Judge.

*Chief Judge of the United States District Court for the District of Utah, sitting by designation.

Petitioner, A. S. Horner, Inc. (Horner) seeks review of an order of the National Labor Relations Board (NLRB) directing Horner to cease and desist from refusing the bargain collectively with the New Mexico District Council of Carpenters, AFL-CIO (District Council). Respondent, NLRB, cross-petitions for enforcement of its order.

Horner is a New Mexico corporation engaged in highway and engineering construction work throughout the State of New Mexico. On July 21, 1978, the District Council filed a petition for certification with the Albuquerque, New Mexico office of the NLRB. The District Council sought to represent all of Horner's employees employed at one particular project except heavy equipment operators already represented by another union.

At the pre-election hearing on the petition, Horner objected to the designation of a single-project unit because that particular project was soon to be completed. Horner further objected to the appropriateness of the proposed multi-craft bargaining unit as opposed to units drawn along craft lines.

On August 23, 1978 the regional director of the NLRB issued a Decision and Direction of Election (initial decision) wherein he found the single-project unit inappropriate and ordered an election in a state-wide unit. However, the regional director did sustain the designation of a multi-craft unit, concluding that there existed a community of interest between the employees. The regional director also found that those employees who were employed during the payroll period immediately preceding the date of his decision were eligible to vote at the election.

The election was held on September 22, 1978. The majority of the voters cast their ballots in support of the union. On September 29, 1978 Horner filed objections to the election alleging that the election should be set aside because, (1) the District Council had made misrepresentations to the employees at pre-election meetings, (2) the District Council improperly extended a waiver of initiation fees to employees who would sign authorization cards prior to the election, (3) the designation of a multi-craft unit was inappropriate, and (4) certain employees were disenfranchised as a result of the voter eligibility formula employed by the NLRB. Although no hearing on the objections was held, Horner was allowed to submit evidence in support thereof.

On November 14, 1978, the regional director issued a Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certificate of Representative (supplemental decision). In this supplemental decision, the regional director overruled Horner's first two objections on their merits. The regional director further concluded that Horner had waived the last two objections concerning the appropriateness of the bargaining unit and the voter eligibility formula by failing to make a request for review of the director's initial decision. Thus the regional director certified the District Council as the exclusive bargaining representative of Horner's employees. On December 5, 1978 Horner filed a request for review of the regional director's supplemental decision.[1]

The Board denied the request for review by telegram dated January 16, 1979. The Board stated that the request failed to raise "substantial issues warranting review". Thereafter Horner refused, upon request, to bargain with the District Council and an unfair labor practice proceeding was instituted against Horner. Horner answered the charge by contending that the District Council had not been properly elected or certified.

The case was transferred to the Board in Washington on May 1, 1979. The general counsel for the NLRB filed a motion for summary judgment. Horner responded that summary judgment was not proper inasmuch as material issues of fact existed and resolution of those issues necessitated formal hearings which had previously been denied.

On November 8, 1979, the Board issued a decision wherein it granted the general counsel's motion for summary judgment. The Board found that the issues raised by Horner had already been litigated in the representation hearing and adopted the regional director's previous finding that Horner had waived its objections to the appropriateness of the multicraft unit and the voter eligibility formula.

[1] Although the Board states in its brief that the request for review was timely made, subsequent statements at oral arguments raised the issue of timeliness. The supplemental decision states that the request for review was required to be filed by November 27, 1978. It appears that Horner made a motion for an extension of time within which to file the request for review. It is not clear what the disposition of that motion was. In any event, the Board acted upon the request. Accordingly, we will consider the request as timely made.

In its petition for review, Horner contends that, (1) the NLRB denied it due process at all stages of the proceedings, (2) the regional director's finding that a multi-craft unit was appropriate was arbitrary, an abuse of discretion and not supported by substantial evidence, (3) the voter eligibility formula utilized by the regional director was erroneously applied and an abuse of discretion, and (4) the Board erred in its treatment of Horner's objection to the election concerning the District Council's alleged misrepresentations.

I.

Horner contends that the Board denied it due process by concluding that Horner had waived its right to object to the regional director's findings as to the appropriateness of the multi-craft bargaining unit and the voter eligibility formula. Specifically, in his supplemental decision, subsequently adopted by the Board, the regional director concluded that Horner's failure to request review of the initial decision prior to the election, as provided for by Reg. 102.67(b), 29 C.F.R. § 102.67(b), amounted to a waiver of those objections. Horner admits that it failed to request review of the initial decision but contends that such failure did not amount to a waiver. Horner asserts a right to object to the regional director's findings by post-election objections, based on the rationale that the pre-election hearing, the election and the post-election proceedings constitute one continuous proceeding. Thus, Horner contends, it is entitled to object to any time during this proceeding, and consequently its request for review of the regional director's supplemental decision preserved the issue for appeal. Horner's argument ignores that dictate of Reg. 102.67(b), 29 C.F.R. § 102.67(b) which provides that the regional director's decision and direction of election is final unless appealed.

At the onset we note that the Board's procedure allowing the regional director to determine the appropriate unit is proper. Further, inasmuch as the regional director is required to follow the same rules as the Board in making that determination, there is no requirement that the Board make an independent determination of the appropriate bargaining unit. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). Consequently, there is nothing offensive in the Board's regulation establishing the finality of the regional director's decision.

The Board has promulgated regulations providing procedures for review of the regional director's decisions at each step of the certification proceedings. If a party fails to allow the prescribed procedure at the appropriate time he is deemed to have waived his objections. This waiver policy is consistent with the Board's legitimate concern as expressed in *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946) that an "election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result." Thus the fallacy in Horner's argument, that it should be allowed to object to the preliminary issues of the appropriate bargaining unit and voter eligibility formula by way of post-election objections, is apparent.

In addition to failing to avail of the request for review procedure provided for by Reg. 102.67(b), 29 C.F.R. § 102.67(b) on the issue of the voter eligibility formula, Horner also bypassed the challenge procedure provided for by Reg. 102.69(a), 29 C.F.R. § 102.69(a). Horner's attempt to raise the voter eligibility issue by post-election objections ignores the distinction between challenges and objections as set forth in *NLRB v. A. J. Tower Co.*, *supra*, at p. 334: "Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly. Challenges, on the other hand, concern the eligibility of prospective voters."

Horner's failure to request review by the Board of the regional director's initial decision constituted waiver of his right to a hearing on the merits before the Board, and it also resulted in a waiver of his right to court review of those issues. As a general rule, the court will not review issues not presented to the Board. National Labor Relations Act, Section 10(e), 29 U.S.C.A. § 160(e). This is so inasmuch as the court is entitled to the benefit of Board expertise. *NLRB v. Gold Spot Dairy, Inc.*, 417 F.2d 761 (10th Cir. 1969); *NLRB v. Midwestern Mfg. Co.*, 388 F.2d 251 (10th Cir. 1968); *NLRB v. Peyton Fritton Stores, Inc.*, 336 F.2d 769 (10th Cir. 1964); *NLRB v. Allied Prod. Corp.*, 548 F.2d 644 (6th Cir. 1977).

We recognize that the waiver rule may produce a harsh result. Nevertheless, it does not amount to a denial of due process as Horner contends. Due process requires only that a party be given notice and an *opportunity* to be heard. This is

not the situation presented in *NLRB v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964) or *NLRB v. Howard Johnson Co.*, 398 F.2d 435 (3d Cir. 1968) wherein the courts found the employer had never been granted an opportunity to be heard on certain issues.

Horner did raise the issue of the appropriateness of the bargaining unit at the pre-election hearing and it was "fully litigated" at that time. Horner also had the opportunity to litigate the voter eligibility formula at the pre-election hearing and through the challenge procedure. Horner was specifically apprised of its right to request review of the regional director's findings on those issues on the face of the initial decision. Horner's case is akin to the situation present in *NLRB v. Thompson Transport Company*, 406 F.2d 698 (10th Cir. 1969) wherein we said,

> ....The fundamental of *Ideal* is simple and basic—due process in an administrative hearing requires an opportunity to be fully heard upon any issue that is determinative of the rights of the parties and when that opportunity is denied at the interlocutory level no finality can be accorded the determination there made. But this principle has not been abused by the Board in the case at bar. Although the Company did seek and obtain review of the Regional Director's determination of the appropriate unit the Board acted well within its discretion in holding that the issue of Hodge's status could be best determined through the challenge procedure....In any event the Board procedures provided full opportunity for review of the Director's decision to count the Hodge vote and the Company did not seek such review. To continue the issue as appropriate in the unfair practice hearing would be but to nullify the effectiveness of § 102.67(b) and violate the cautionary words of the Supreme Court that "*** courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54.

See also: *NLRB v. WEK Drilling Co.*, 438 F.2d 267 (10th Cir. 1971) (employer who bypassed opportunity for hearing was foreclosed from raising issue in subsequent proceedings.)

Thus, we hold that the Board did not err in concluding that Horner had waived his right to object to the appropriateness of the bargaining unit and the voter eligibility formula. Accordingly, such conclusion did not violate Horner's due process rights, and we must decline to reach the merits of those issues.

II.

In a connected due process challenge, Horner contends that the regional director's failure to make specific findings of fact concerning the appropriateness of the multi-craft unit violated its due process rights.

The Board has an affirmative duty to set forth findings of fact supporting its conclusions. *NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438 (1965); *NLRB v. Groendyke Transport, Inc.*, 372 F.2d 137 (10th Cir. 1967), *cert. denied*, 387 U.S. 932 (1967); *Paceco v. NLRB*, 601 F.2d 180 (5th Cir. 1979).

We agree with Horner that the regional director failed to set forth sufficient findings of fact supporting his unit determination. Although the director did render findings of fact in support of the designation of a state-wide unit, he did not do so in support of his designation of a multi-craft unit. The regional director simply stated that the employees in the proposed unit had a community of interest, that the District Council sought to represent all of Horner's employees, and that the employees were not represented by any other union. The regional director's decision fails to apprise us of his reasons for designating a multi-craft unit as opposed to a single-craft unit. *See NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980).

Normally, we would remand when we ascertain that the regional director failed to make sufficient findings of fact. However, remand in the instant case would serve no purpose. The purpose of requiring the Board to make specific findings of fact is to enable the reviewing court to determine whether there exists sufficient evidence to support the Board's conclusions. *NLRB v. Metropolitan Ins. Co., supra*, *NLRB v. Groendyke Transport, Inc., supra*. If we should remand the case to require the regional director to make findings of fact so that

we would be better able to assess whether there was sufficient evidence to support his conclusion that the multi-craft unit was appropriate, it would be a meaningless requirment, inasmuch as we have determined that Horner waived his right to object to the multi-craft unit. A remand under these circumstances for specific findings of fact would be an exercise in futility.

III.

In regard to the issue of alleged misrepresentation made by the District Council prior to the election, Horner assigns as error, (1) the Board's failure to provide a hearing on the issue, (2) failure to make specific findings of fact, and (3) the Board's conclusion that Horner's objection was without merit.

Horner alleged in its post-election objections that the District Council misrepresented to the employees that if the District Council won the election the employees would be represented not only by the Council but also by other craft unions. In support of this allegation, Horner supplied the regional director with names of employees who had information concerning the alleged misrepresentations and also submitted a copy of a memorandum from the District Council to Horner's employees which stated, *inter alia*:

> The Council wishes to thank all of the people involved for their cooperation and wants to assure them that if the voting is favorable the District Council with the assistance of the other craft unions will do everything in their power to negotiate a favorable agreement. I would like to add that the employees have the power to reject or approve any settlement that the unions might negotiate.

At the time of the regional director's decision the standard of review of alleged misrepresentations was that announced in *Shopping Kart Food Markets, Inc.*, 228 NLRB 1311 (1977). In *Shopping Kart* the Board held that its concern would be directed at the manner in which misrepresentations were made rather than the substance of the misrepresentation. Thus, the Board would set aside an election only if the misrepresentation involved the Board or its processes. The regional director concluded that, even if Horner's employees "were told that other unions would take part in negotiations

along with petitioner or that they would be able to join other craft unions, such statements are neither clearly misrepresentations of the consequences of Board certification nor the type of misrepresentations contemplated in the Board's exceptions in *Shopping Kart*."

In its subsequent denial of review, the Board stated, "As to Objection 1 the Board was satisfied that even under the decision in General Knit of California, Inc. 239 NLRB No. 101, just issued, no substantial issues are raised warranting review (member Penello would deny review under Shopping Kart criteria)."

Subsequent to the regional director's decision, the Board had announced *General Knit of California, Inc.*, 239 NLRB No. 101 (1978) wherein it abandoned the *Shopping Kart* standard and reinstated the standard set forth in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). In *Hollywood Ceramics*, the Board held than an election would be set aside due to misrepresentations if the misrepresentations were material to the extent that they may have had an impact on the election, and if the employees did not have sufficient knowledge to make their own determination and the opposing party did not have an opportunity for rebuttal.

We hold that the Board did not err in refusing to provide a hearing on the misrepresentation issue. Under the regulations, Reg. 102.69(c), 20 C.F.R. § 102.69(c) the regional director is simply required to hold a hearing on post-election objections if there exist substantial and material issues of fact. The regional director stated in his decision that it was not clear what the employees had been told. However, the regional director did not deem the issue of fact material, nor do we. The regional director assumed the truth of Horner's allegations and nevertheless concluded that such misrepresentations did not warrant a new election. Consequently, a hearing to determine what the employees were in fact told, would not have added to or changed the result.

Similarly, we hold that the regional director did not fail in his duty to make adequate findings of fact. The regional director set forth on the face of his decision the results of his investigation.[3] Inasmuch as the facts as alleged by Horner were assumed, no additional specific findings of fact were necessary. The regional director applied the law to the facts

as alleged by Horner and concluded that the misrepresentations did not call for a new election.

Finally, Horner contends that the Board erred in concluding that the alleged misrepresentations did not warrant a new election. The court will give deference to the Board's decision and will not set aside the Board's conclusions unless it is determined that the Board acted in an arbitrary and capricious manner. *Burns Intern. Sec. Services, Inc. V. NLRB*, 567 F.2d 945 (10th Cir. 1977); *NLRB v. R. L. Sweet Lumber Company*, 515 F.2d 785 (10th Cir. 1975), *cert. denied*, 423 U.S. 986 (1975). As the regional director noted in his supplemental decision, there is nothing in the National Labor Relations Act precluding the District Council from consulting with other unions in the bargaining process. Thus, representation by the District Council that it would consult with other unions did not substantially misrepresent Board processes. The regional director's decision also indicates that he was not convinced that the employees were misled into believing that they could join other unions and that even if the employees were so informed, such information would not have been understood by the employees as having Board sanction.

[3] It appears from the investigation that final meetings were held by the Petitioner for employees both in Costilla and Tucumcari, New Mexico, one week or two weeks before the election. Some employees understood from the representatives of the Petitioner at these meetings that some other craft unions had already been contacted and that if the Petitioner won the election, employees would have an opportunity to join the craft union of their choice at a reduced rate. These other craft unions would then take part in negotiations along with the Petitioner. Other employees understood that if the Petitioner won it would then attempt to secure an understanding with other craft unions which would allow employees to be members of those other craft unions. Still other employees understood that if the Petitioner was successful in the election, the Petitioner would represent the employees in the unit.

The investigation does not clearly establish with any precision exactly what employees were told in this regard by representatives of the Petitioner. The Petitioner's letter itself is ambiguous, apparently implying that while other unions may participate with the Petitioner in negotiations with the Employer, that this participation may be active or be limited merely to consultation.

In light of our standard of review, and bearing in mind that the Board did not find that the alleged misrepresentations warranted a new election under either the *Shopping Kart* or the *General Knit* standards, we cannot hold that the Board's failure to set aside the election was arbitrary and capricious.

The Board's cross-petition for enforcement of its order is granted.

JULY TERM - September 7, 1982

Before Honorable Robert H. McWilliams, Honorable James E. Barrett, Circuit Judges, and Honorable Aldon J. Anderson, District Judge*.

A. S. HORNER, INC.,

Petitioner

v. No. 79-2185

NATIONAL LABOR RELATIONS BOARD,

Respondent

This matter comes on for consideration of Petitioner's petition for rehearing, or in the alternative, to recall and stay the mandate.

Upon consideration whereof, it is ordered that:

1. The petition for rehearing is denied.
2. The mandate of this Court issued July 15, 1982, is hereby recalled.

It is further ordered that the mandate shall be stayed until October 7, 1982, pending certiorari, and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that petitioner has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

* Of the United States District Court for the District of Utah, sitting by designation.

A.S. Horner, Inc. *and* New Mexico District Council of Carpenters, AFL-CIO. Case 28-CA-5255

November 8, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

Upon a charge filed on March 9, 1979, by New Mexico District Council of Carpenters, AFL-CIO herin called the Union, and duly served on A. S. Horner, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director of Region 28, issued a complaint and notice of hearing on April 6, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice to hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 16, 1979, following a Board election in Case 28-RC-3517, the Union was duly certified as the exclusive in the unit found appropriate;[1] and that, commencing on or about January 19, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 16, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

[1] Official notice is taken of the record in the representation proceeding, Case 28-RC-3517, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.* 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co., v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

On April 25, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 1, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a "Statement in Reply to the Notice To Show Cause and in opposition to the General Counsel's Motion for Summary Judgment." Respondent additionally filed a motion to remand and reopen the record and the General Counsel filed an opposition to the motion to remand and to the statement in reply to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgement

In its statement in reply to the Notice To Show Cause, Respondent contended that the certification of the Union in the underlying representation proceeding is invalid for the following reasons. First, Respondent argued that the Regional Director's failure to direct a hearing on its objections to the election was in error because the objections raised substantial factual issues warranting a hearing. As a corollary to this contention, Respondent also argued that the statements of witnesses taken by the Regional Office during the representation case investigation should now be made part of the current record as the representation case is now closed and the inclusion of such statements here would insure that the Board has before it a complete record upon which to determine the instant matter. Respondent further asserted that the Regional Director prejudiced Respondent's right of appeal in the representation proceeding by writing a Decision and Certification of Representation in lieu of a Report on Objections as the former limits consideration by the Board to the request for review procedure, an abbreviated form of review. Finally, Respondent contends that its initial failure to request review

of the Regional Director's unit finding and voter eligibility formula set forth in his Decision and Direction of Election did not constitute a waiver of its right to later contest these findings as objections to the election.

In its motion to remand, Respondent argues that the record before the Board in this proceeding is presently incomplete as it does not contain the statements and affidavits of employees interviewed by the Regional Director in the investigation of the objections. Respondent seeks inclusion of these documents in the record.

In opposition to Respondent's various motions, the General Counsel argues that the import of Respondent's motion to remand is contrary to the Board's Rules and Regulations and its statement in opposition to the summary judgment motion is generally an attempt to relitigate issues already decided adversely to Respondent. We find merit in the General Counsel's position and we shall enter summary judgment against Respondent for reasons described below.

Our review of the record herein, including the record in Case 28-RC-3517, reveals that on August 23, 1978, the Regional Director for Region 28 issued a Decision and Direction of Election in Case 28-RC-3517 in which he found appropriate a unit of all construction employees, including timekeepers, employed by Respondent in the State of New Mexico with various exclusions. In his decision, the Regional Director found, *inter alia*, that in view of the imminent completion of Respondent's construction activity near Costilla, New Mexico, no useful purpose would be served by directing an election in a unit limited to the employees involved therein, the unit initially sought by the Union. However, as the Union had indicated a willingness to proceed to an election in a statewide unit, a unit found appropriate by the Regional Director, an election in that unit was directed by the Regional Director provided that the Union submitted an adequate showing of interest in the broader unit. Respondent did not seek review of the Regional Director's decision. Thereafter, on September 22, 1978, pursuant to the Decision and Direction of Election, a secret-ballot election was conducted. The tally of ballots revealed that a majority of the valid ballots had been cast for the Union and that the one challenged ballot was not determinative. On September 19, 1978, Respondent timely

filed objections to conduct affecting the results of the election. On November 14, 1978, the Regional Director issued a Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative wherein he overruled the Employer's objections in their entirely and issued a Certification of Representative to the Union. Respondent's four objections alleged that (1) the Union had mischaracterized and misrepresented Board procedures; (2) the Union had improperly extended a waiver of initiation fees to eligible voters; (3) the unit in which the election was conducted was inappropriate; and (4) the Regional Director had used an inappropriate voter eligibility formula in his Decision and Direction of Election, resulting in the disenfranchisement of potential voters. The Regional Director overruled Objection 1, finding that the Union's statement did not constitute a misrepresentation under the Board's Decision in *Shopping Kart Food Market, Inc.*[2] The Regional Director also found Objection 2 without merit, noting that his investigation had failed to produce any evidence which indicated that the Union's offer to waive initiation fees was tied to the signing of an authorization card or becoming a member of the Union prior to the election. With respect to Objections 3 and 4, regarding the unit issue and voter eligibility formula, the Regional Director found these objections raised issues which were discussed in his Decision and Direction of Election and as to which Respondent had not sought review. Thereafter, he concluded that Respondent was precluded from raising these issues at this stage of the proceeding.

On December 5, 1978, Respondent filed a request for review of the Regional Director's Supplemental Decison, alleging that the Regional Director had erroneously overruled Respondent's four objections. On January 16, 1979, the Board, by telegraphic order, denied Respondent's request for review, but granted Respondent's motion, filed December 29, 1978, to stay the effective date of the certification and ordered that the certification would be effective as of January 16, 1979.[3]

[2] 228 NLRB 1113 (1977).

[3] In its telegraphic decison denying Repondent's request for review, the Board noted that Objection 1 did not constitute a misrepresentation under its recent decision in *General Knit of California, Inc.*, 239 NLRB 619 (1978). Member Penello indicated he would deny review under *Shopping Kart, supra.*

We have reviewed the contentions raised by Respondent in this proceeding and find that they raise no issues warranting a stay of a grant of summary judgment. Respondent avers that a hearing is necessary to resolve key factual issues raised in Objection 1 involving allegedly misleading statements concerning the identity of the union or unions that would be participating in negotiations on behalf of the employees. Respondent unsuccesfully raised this argument in its request for review and we again find it without merit inasmuch as the Regional Director, in making this recommendation, assumed the facts as alleged by Respondent and nevertheless found the conduct unobjectionable. Respondent raises the same argument as previously raised and rejected in the representation proceeding with respect to Objection 2 involving an allegedly improper offer to employees to waive initiation fees. With respect to Respondent's request that statements of witnesses obtained by the Region during the representation case be incorporated into the instant unfair labor practice proceeding, we note that in a recent decision[4] the Board was confronted with a similar request and denied it. The Board stated there "such material is not part of record in either an unfair labor practice case or its underlying representation case 'within the meaning of Sections 102.68 and 102.45(b) of the Rules and Regulations of the Board, nor are such documents [materials relating to the representation case] encompassed within the requirements of Section 9(d) of the Act.' "[5] We reach the same conclusion here.[6]

With respect to Respondent's contention that the Regional Director limited Respondent's right of appeal by the manner in which he disposed of Respondent's objections, i.e., by a Supplemental Decision and Certification of Representative, we find that in rendering his decision the Regional Director proceeded in a manner authorized by Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended. We therefore find the Regional Director's action appropriate and

[4] *Harvey Engineering & Manufacturing Corporation*, 240 NLRB 699 (1979).

[5] *Id.* at fn. 1 and cases cited therein.

[6] As noted, Respondent has also filed motion to remand and reopen the record to admit these statements into the record. For the reason discussed immediately above, Respondent's motion is hereby denied.

not subject to collateral attack by Respondent. Furthermore, we note that Respondent was entitled to appeal the decision through the request for review procedure and, in fact, Respondent exercised that right.

Finally, we find that Respondent's failure to contest the Regional Director's unit determination and voter eligibility formula through the request for review procedure constituted a waiver of its right to appeal that finding in a subsequent proceeding. The preelection review process was the appropriate forum for raising such matters, and by neglecting to utilize it Respondent is precluded from asserting those issues now before us.[7]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[8]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in its unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

[7] See, e.g., *Walnut Mountain Care Center*, 236 NLRB 284 (1978).

[8] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69(c).

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New Mexico corporation, engaged in the construction industry, and maintains its principal place of business in Littleton, Colorado. Respondent has been engaged in construction business at various locations in New Mexico including Costilla, Folsom, Tucumcari, and Mosquero. During the 12 months preceding the complaint's issuance, a period which is representative of its operations at all times material herein, Respondent, in the course and conduct of its business, purchased goods and materials in excess of $50,000 which were delivered to its place of business in New Mexico directly from locations outside the State of New Mexico.

II. THE LABOR ORGANIZATION INVOLVED

New Mexico District Council of Carpenters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All construction employees including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors as defined in the Act.

2. The Certification

On September 22, 1978, a majority of the employees of

Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on January 16, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 19, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 19, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since January 19, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occuring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engag-

ing in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, make the following:

CONCLUSIONS OF LAW

1. A. S. Horner, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New Mexico District Council of Carpenters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All construction employees, including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen and guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 16, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 19, 1979, and at all times thereafter, to bargain collectively with the above-named labor

organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, A. S. Horner, Inc., Littleton, Colorado, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New Mexico District Council of Carpenters, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All construction employees, including timekeepers, employed by Respondent in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors within the meaning of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay,

wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at construction sites in New Mexico where Respondent is engaged in construction, including Costilla, Folsom, Tucumcari, and Mosquero, copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[1] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New Mexico District Council of Carpenters, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foreman, watchmen, and guards and supervisors within the meaning of the Act.

A. S. HORNER, INC.

United States Code
Title 29 - Labor

§ 153. National Labor Relations Board

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

§ 160.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of the extraordinary circumstances. The

findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jursidiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and

shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered a a whole shall in like manner be conclusive.

Code of Federal Regulations
Title 29 - Labor

§ 102.60. Petitions

(a) *Petition for certification or decertification; who may file; where to file; withdrawal.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed,[4] and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Four copies of the petition shall be filed. Except as provided in § 102.72, such petitions shall be filed with the regional director for the regions wherein the bargaining unit exists or, if the bargaining unit exists in two or more regions, with the regional director for any such regions. Prior to the transfer of the case to the Board, pursuant to § 102.67, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After

the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

[4] Blank forms for filing such petitions will be supplied by the regional office upon request.

(29 FR 15919, Nov. 28, 1964)

§102.63. Investigation of petition by regional director; notice of hearing; serving of notice; withdrawal of notice.

(a) After a petition has been filed under § 102.61 (a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under § 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this paragraph (b) shall be in

conformance with §§ 102.64 through 102.68 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in §102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

(29 FR 15919, Nov. 28, 1964)

§ 102.67 Proceedings before the regional director: further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.

(a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on the other parties. Requests for extension of time shall be received not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated. *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Simultaneously therewith, copies thereof shall be served on all other parties to the proceeding and the regional director, and statement of such service filed with the Board. The regional director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the regional director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted, ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner; and all ballots shall be impounded and remain unopened pending such decision.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating

the request. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board eight copies of a statement in opposition thereto, which shall be duplicated and served in accordance with the requirements of paragraph (b) of this section: except that if personal service of the request for review is made upon the Board, 10 days will be allowed. However, 3 days will not be added to either of the aforesaid prescribed periods as provided in § 102.114. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 7 days after the issuance of an order granting review, file eight copies of a brief with the Board, which shall be duplicated and served in accordance with the requirements of subsection (b) of this section. A statement of such service shall be filed simultaneously with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for

review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the regional director, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board eight copies of the brief previously filed with the regional director. Such copies shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. No further briefs shall be permitted except by special permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the regional director and before the parties have filed briefs, such briefs shall be filed as set forth above and served in accordance with paragraph (b) of this section, within the time set by the regional director. If the order transferring the case is served upon the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of time within which to file a brief with the Board for a period not to exceed an additional 14 days. Requests for extension of time in which to file a brief with the Board under authority of this section not addressed to the hearing officer during the hearing shall be filed in writing with the Board and copies thereof shall immediately be served on the other parties and the regional director. Requests for extension of time shall be received by the Board not later than 3 days before the date such briefs are due in Washington, D.C. A copy of any such request shall be served immediately on the other parties and the regional director and shall contain a statement that such service has been made. No reply brief may be field except upon special leave of the Board.

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argu-

ment or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

(26 FR 3889, May 4, 1961, as amended at 29 FR 15920, Nov. 28, 1964; 42 FR 41117, Aug. 15, 1977)

§ 102. 69. Election procedure; tally of ballots, objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceedings is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompty request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition of a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming an representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an

original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made. The party filing objections shall, upon request, promptly furnish to the regional director the evidence available to it to support the objections.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c) If objections are filed to the conduct of the election or conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the regional director shall, consistent with the provisions of § 102.69(d), investigate such objections or challenges, or both. If a consent election has been held pursuant to § 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C., within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C,, with copies of such request served on the other parties, any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together

with a copy of any brief filed on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in § 102.114 will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under § 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to § 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election.

(d) The action of the regional director in issuing a report on objections or challenging ballots, or both, following proceedings under § 102.62(b) or § 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exists which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on

said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in paragraphs (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith.

(e) Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable, except that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 10 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report, with supporting brief, if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be field, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director; except that if personal service of the exceptions and any supporting brief is made upon the regional director, 10 days will be allowed. However, 3 days as provided in § 102.114 will not be added to the prescribed time for filing an answering brief. An original and one copy, which may be a carbon copy, shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(f) In a case involving a consent election held pursuant to § 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not

raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factural issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the dispositon of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow, upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on the other parties, file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be field, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in § 102.114 will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed

or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to § 102.67: *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(g) The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, shall constitute the record in the case. Materials other than those set out above shall not be a part of the record; except that in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision. Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

(h) In any such case in which the regional director or the Board, upon a ruling on challenged ballots, has directed that

such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 3 days after the revised tally of ballots has been furnished, the regional director shall forthwith issue to the parties certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(i)(1) The action of the regional director in issuing a notice of hearing on objections or challenged ballots, or both, following proceedings under § 102.62(b) shall constitute a transfer of the case to the Board, and the provisions of § 102.65(c) shall apply with respect to special permission to appeal to the Board from any such direction of hearing.

(2) Exceptions, if any, to the hearing officer's report or to the administrative law judge's decision, and any answering brief to such exceptions, shall be filed with the Board in Washington, D.C., in accordance with paragraph (f) of this section.

(38 FR 3961. Feb. 8, 1973, as amended at 40 FR 6204, Feb. 10, 1975)